Supreme Court, U.S.
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No. 95-1811

In The

Supreme Court of the United States

October Term, 1995

ALEXANDER STORER, JR.; DOROTHY J. STORER, his wife,

Petitioners,

vs.

CITY OF OCEAN CITY, A Municipal Corporation in the County of Cape May, State of New Jersey,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where governmental regulation deprives a property owner of all economically beneficial use of the property, does the fact that the owner owns a contiguous piece of property which retains beneficial use permit the taking by inverse condemnation of the first parcel without compensation to the owner?

2. How is an owner's property interest defined, for purposes of inverse condemnation under *Lucas v. So. Carolina Coastal Council*, 505 U.S. __, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)?

3. Does fundamental due process require reversal and remand when the court fails to charge the law in accordance with *Lucas v. So. Carolina Coastal Council* in an inverse condemnation case where the owner's property has been deprived of all beneficial use by governmental regulation?

LIST OF PARTIES

Alexander Storer, Jr. and his wife, Dorothy J. Storer, petitioners, were the plaintiffs below; the respondent, City of Ocean City, a municipal corporation in the County of Cape May, State of New Jersey, was the defendant below.

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The petitioners, Alexander Storer, Jr. and Dorothy J. Storer, his wife, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit regarding the Fifth and Fourteenth Amendment issues raised therein.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit appears at Appendix A (App. 1a).

The Opinion rendered by the United States District Court for the District of New Jersey is submitted in the Appendix (App. 15a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit filed its Opinion on February 6, 1996 (App. 1a) and entered its Judgment February 6, 1996 (App. 13a). This Petition is filed within ninety (90) days of the Opinion and Judgment of the United States Court of Appeals for the Third Circuit. Jurisdiction of this Court is predicated on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer to a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

> shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend.V.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend.XIV, § 1.

STATEMENT OF THE CASE

This case arises under the Fifth and Fourteenth Amendments to the United States Constitution. The petitioners are the owners of two adjoining lots in Ocean City, New Jersey, one of which is an oceanfront lot (Lot 1).

Subsequent to the petitioners' purchase, Ocean City adopted restrictive developmental ordinances, prohibiting all construction, and prohibiting the alteration of any sand dunes on the petitioners' oceanfront lot. Petitioners sought compensation for the taking of their property by regulation pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. The matter was tried in the United States District Court on March 13th, 14th and 15th, 1995. The jury returned a verdict in favor of the City of Ocean City on March 15, 1995 (App. 16a). The petitioners' motion for a new trial was denied in an Opinion of the Honorable Jerome B. Simandle, District Judge, by Opinion dated April 19, 1995 (App.15a).

The undisputed factual and procedural background is set forth in Judge Simandle's Opinion denying Summary Judgment to both parties on December 7, 1994 (App. 27a).

In April 1961, petitioners Alexander and Dorothy Storer purchased two lots in Ocean City, New Jersey. Lot 9, Block 3001 contained a duplex home, and Lot 1, Block 3000, the subject of this litigation, consisted of vacant waterfront property.

Lot 9 contained a duplex located at the corner of 30th Street and Wesley Avenue[1] with the address 3000 and 3002 Wesley Avenue. East of the duplex was an unimproved streetbed known as Wesley Avenue and the East of Wesley Avenue was Lot 1. Because that portion of Wesley Avenue was not developed, Lot 1 was not accessible by road at the time of the petitioners' purchase in 1961.

In 1971 the City of Ocean City officially vacated the streetbeds of Wesley Avenue beyond 29th Street. Thus, by

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1. Judge Simandle's Opinion of December 7, 1994, mistakenly refers to the location as Central Avenue.

operation of law, the petitioners became the owners of the vacated streetbeds adjacent to Lot 1. When the vacated streetbed was added to Lot 1, petitioners acquired direct access to the unimproved end of 30th Street, thus making Lot 1 accessible by road. When the petitioners learned of this development in 1989, they sought to develop Lot 1. However, the enactment of certain local ordinances after their purchase prevented their utilizing the property for any development whatsoever.

A brief outline of the Ocean City regulatory activities preventing the petitioners' ability to develop Lot 1 is set forth in Judge Simandle's December 7, 1994 Opinion. (App. 28a).

> Prior to 1971, there were no zoning regulations which applied to Lot 1. Dep. of John R. Gideonse, PP, AICP, at 17:11-15.[2] In 1971, the Commissioners of Ocean City adopted an ordinance establishing a Coastal Beach Zone. *Id.* at 18:9-18. That ordinance applied to all beachfront property in Ocean City over which the Ocean City government exercised authority, including Lot 1. *Id.* at 19:9-15. The coastal Beach Zone established by the 1971 ordinance corresponds with the bulkhead line. *Id.* at 19:23-25. No residential construction was permitted in the Coastal Beach Zone. *Id.* at 20:9-11.
>
> In April, 1981, the Flood Damage Prevention Ordinance was adopted. *Id.* at 20:12-17. That ordinance prohibits the

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2. Mr. Gideonse was Planning Director for the City of Ocean City for ten years at the time of his *de bene esse* deposition on September 22, 1994. (footnote in original text).

> alteration of any sand dune. Pursuant to the ordinance, a permit must be issued prior to any alteration or construction on a dune. Ex. "E" to Def. Br. It is undisputed that Lot 1 consists largely of dunes.
>
> In 1985, the City adopted Ordinance 85-6. Gideonse Dep. at 23:22-24. That ordinance created the Beach and Dune Zone, which was 'essentially the same zone that was previously established in 1971.' *Id.* at 24:6-14. No residential construction was permitted in the Beach and Dune Zone. *Id.* at 25:7-9. In 1988, the City adopted a Master Plan and a new comprehensive zoning ordinance in accordance with N.J.S.A. § 40:55-D-89. *See* Ex. "G" to Def. Br. The 1988 ordinance contains a Beach and Dune Zone identical to the 1985 Beach and Dune Zone. Gideonse Dep. at 29:4-11. The purpose of the Beach and Dune Zone was to protect Ocean City from flood damage during storms. *Id.* at 27:20-23.

(App. 29a). After being denied a variance to construct a two-family dwelling on their oceanfront property and after exhausting the appropriate administrative appeals, petitioners sought relief before the United States District Court for the District of New Jersey, seeking compensation based on inverse condemnation, arguing that their property had no beneficial economic use as a result of the regulations adopted by the City of Ocean City.

Petitioners' right to recovery was based on the holding of *Lucas v. So. Carolina Coastal Council*, 505 U.S. __, 112 S. Ct.

2886, 120 L. Ed. 2d 798 (1992), which established the proposition that if a state regulation deprives a property owner of all "economically viable use" of a piece of property, a compensable "taking" has occurred. *Id.*, 505 U.S. at __. The District Court gave incorrect instructions to the jury, omitting the law established by this Court in *Lucas v. So. Carolina Coastal Council*, and requiring instead that the jury determine whether or not petitioners had a "reasonable investment-backed expectation" when they purchased the property.

In its appeal to the Court of Appeals for The Third Circuit, the petitioners contended that the District Court incorrectly construed and incorrectly applied the applicable law governing the subject of inverse condemnation, or a taking by governmental regulatory action. The petitioners contended that the Court's misapplication of the law was plain error, requiring reversal and remand.

In its Opinion below, the Court of Appeals for the Third Circuit agreed with the petitioners' argument that

> Under controlling case law they (plaintiffs) *should not have been required to prove both that they had a reasonable investment-backed expectation to develop Lot 1 and that the property at issue had no economically viable use as a consequence of the Ocean City Ordinances.*

(App. 4a). (Emphasis supplied). The Court of Appeals for the Third Circuit held further that the instructions to the jury were flawed (App. 4a) and that the jury verdict form was flawed (App. 5a). The Court of Appeals found that the court below erred in that

> These instructions (to the jury) did not account for the impact that the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S. Ct. 2886 (1992), could possibly have had on the instant case. The *Lucas* court established a *per se* rule that if a State regulation deprives a property owner of all "economically viable use" of a piece of property, a compensable "taking" has occurred. *See Id.* at 2895 ("when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, he has suffered a taking"). The *Lucas* Court's holding clearly means that Courts are not to apply the reasonable investment-backed expectation balancing test set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), if a land use regulation is a taking *per se*.

(App. 6a).

The Third Circuit went on to outline the proper instructions which should have been given by the court below:

> In light of the Supreme Court's decision in *Lucas*, this case should have been presented to the jury in the following terms. The dispositive issue here should have been whether the "relevant parcel" consisted of Lot 1 alone or Lots 1 and 9 together. In the language of takings law, the jury should first have been called upon to determine the composition of the "denominator parcel." *A*

> *finding that Lots 1 and 9 were discrete properties would have inevitably led to a finding that a taking had occurred because defendant Ocean City conceded that "consistent with the Beach and Dune ordinances and the administrative action on plaintiffs' proposal for development, there is no economically viable use that Lot 1 may be put to." Storer v. City of Ocean City*, No. 94-2277, at 6 (D.N.J. Dec. 7, 1994). *Since there is no dispute that Lot 1 has no economically viable use at the resent time, plaintiffs would then have been entitled to compensation for defendant Ocean City's "taking" of Lot 1.*

(Emphasis supplied).

> On the other hand, if the jury was to find that Lots 1 and 9 were intended to be a single parcel, only then should it have been asked whether the Storers were deprived of a reasonable investment-backed expectation. If the jury had then found that the Storers had a reasonable investment-backed expectation that was defeated by Ocean City's various land use regulations, then a taking occurred and the plaintiffs were entitled to compensation. If Lots 1 and 9 should have been treated as a single unit and, as the jury found here, no reasonable investment-backed expectation existed, only then should the jury have ceased its deliberations and ruled in favor of defendant Ocean City.

(App. 7a).

Despite its conclusion that the District Court had erred in failing to instruct the jury in accordance with this Court's decision in *Lucas v. So. Carolina Coastal Council*, it nonetheless held that petitioners were not entitled to a reversal under the plain error rule because "it is impossible to say with any degree of probability that the jury, if instructed properly, would have found Lot 1 and Lot 9 to be separate parcels" (App. 11a).

In reaching that holding, the Court of Appeals noted that the Supreme Court of the United States has not yet provided "adequate guidance on the relevant parcel issue" in its holdings in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) and *Lucas*. The Court of Appeals referred to Justice Scalia's footnote in the *Lucas* decision:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or in one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme, and, we think, unsupportable view of the relevant calculus, *see Penn Central* . . . , where the state court examined the diminution in a relevant parcel's value produced by a municipal

> ordinance in light of the total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, the uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. *Compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S. Ct. 158, 160 (1922) (law restricting subsurface extraction of coal held to effect a taking), *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497502, 107 S. Ct. 1232, 1248-51 (1987) (nearly identical law held not to be a taking) . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Lucas, 112 S. Ct. at 2893 n.7, 120 L. Ed. 2d at 813-814 n.7. (Emphasis added in the Opinion of the Court of Appeals of the Third Circuit). (App. 9a).

The Opinion, therefore, of the United States Court of Appeals for The Third Circuit is that the District Court erred in its charge to the jury when it failed to charge the law set down by this Court in *Lucas*. Despite that error, the Court of Appeals held that the plain error rule[3] did not require reversal because this

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3. The analysis of the question of plain error is set forth in *Kotteakos v.* (Cont'd)

Court has not as yet clarified the issue raised by Justice Scalia in *Lucas* as to what constitutes a "parcel". The result is that the petitioners have suffered the loss of all economically viable use of their property, but have been denied compensation because this Court has not as yet clarified the issue of what constitutes a parcel of land when the land in question comprises more than one lot. This matter cries out for consideration of the very question raised by Justice Scalia in *Lucas*, for a clarification of the " 'property interest' against which the loss of value is to be measured." *Lucas, supra*, 112 S. Ct. at 2893 n.7, 120 L. Ed. 2d at 813814 n.7.

(Cont'd)
United States of America, 328 U.S. 750, 90 L. Ed. 1557 (1945). There the Supreme Court considered the difference between harmless error and plain error requiring reversal of a conviction in a criminal context:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress (citation omitted). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. 328 U.S. 765.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS NOT DECIDED HOW TO DELINEATE THE RELEVANT PROPERTY INTEREST WHERE AN INVERSE CONDEMNATION HAS OCCURRED.

This Court should grant the Writ of Certiorari in order to resolve the question raised by Justice Scalia in *Lucas v. So. Carolina Coastal Council* as to the delineation of the property interest against which the loss of value is to be measured in an inverse condemnation case.

Lacking guidance from this Court, the Third Circuit Court of Appeals held that the petitioners' two lots might have been considered by the jury to be one lot. Accordingly, the Court of Appeals concluded that petitioners retained some economic value because building was permitted on Lot 9 while prohibited on Lot 1. However, this Court has as yet given no guidance to the Circuit Courts of Appeals as to the appropriate method of determining the property interest whose value is diminished or eliminated by governmental regulation.

In *Penn Central Transp. Co. v. New York City,* this Court held that the "taking" by regulation, of air rights above the Grand Central Terminal, designated a "landmark" under New York City's Landmarks Preservation Law, was not a compensable taking under the Fifth and Fourteenth Amendments because the New York City statutory scheme gave Penn Central "transfer development rights" allowing its owners to transfer unused developmental potential to contiguous lots. Because Penn Central owned a number of eligible recipient lots, the United States Supreme Court held that the transfer rights would

"undoubtedly mitigate whatever financial burdens the law has imposed," *Penn Central Transp. Co., supra*, 438 U.S. at 137, 57 L. Ed. 2d at 657.

Numerous decisions of Courts of Appeals have struggled with the issue of the delineation of property rights for purposes of determining whether a compensable taking has occurred. The Fifth Circuit considered the issue in *Naegele Outdoor Advertising Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988). There the Court of Appeals considered the question of whether a municipal ordinance which prohibited commercial billboards constituted a taking. The issue raised was whether or not multiple billboards constituted a single property interest. The Court of Appeals remanded the issue to the District Court for specific findings concerning the effect of the ordinance on the billboard company's business. *Id.* at 176.

In *Furey v. The City of Sacramento*, 780 F.2d 1448 (9th Cir. 1986), the Ninth Circuit concluded that the right to beneficial use of a sewer is not a discrete form of property separable from other ownership rights for the purposes of a takings analysis. The court there referred to this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) for the proposition that "[the] application of a general zoning law to a particular property effects a taking only if the owner is denied all economically viable use of the land," *id.*, 447 U.S. at 260, 100 S. Ct. at 2141, but determined that the plaintiff in that case retained an economically viable use of his land, that is, agriculture.

The question of restrictions on hunting licenses as a separable property right was considered by the Tenth Circuit in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), and relying on the traditional *Penn Central* approach that "regulatory taking jurisprudence 'does not divide a single into discrete segments and attempt to determine whether rights in a

particular segment have been entirely abrogated',", *id.* at 1577.

The question of whether two contiguous pieces of property owned by the same owner and subjected to different zoning restrictions should be considered as one parcel or two was considered by the Ninth Circuit in *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981). There the court did not reach the specific issue of whether the parcels should be considered separately to determine whether, under *Lucas*, one of the parcels had been deprived of all of its economically viable use, because, in contrast to the case at hand, some economically viable use was concededly permitted on each parcel.

The problem raised by Justice Scalia in his footnote in the *Lucas* decision (n.7) should be resolved by this Court. The fact that this issue has remained open resulted in the uncompensated taking by regulation of petitioners' beachfront property.

II.

THE COURT OF APPEALS DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING IN *LUCAS V. SO. CAROLINA COASTAL COUNCIL.*

This Writ of Certiorari should also be granted because the Third Circuit Court of Appeals rendered a decision directly in conflict with this Court's holding in *Lucas v. So. Carolina Coastal Council.* The Court of Appeals for the Third Circuit acknowledged in its Decision that the petitioners were correct when they argued that the trial judge misstated the law. That misstatement of the law resulted in the petitioners' being denied all economically beneficial use of Lot 1 without being compensated.

The guiding principle that a landowner is entitled to

compensation when regulation denies all economically beneficial or productive uses of the land was enunciated by the United States Supreme Court in the case of *Lucas v. So. Carolina Coastal Council*, 505 U.S. __, at 112 S. Ct. at 2895, 120 L. Ed. 2d at 815. The petitioner in that case owned two residential lots. The South Carolina legislature enacted the Beachfront Management Act which barred the petitioner from erecting any permanent habitable structures on his two parcels. The Court there considered the question of whether the Act's complete extinguishment of petitioner's property value entitled him to compensation, regardless of whether the legislature had acted in furtherance of legitimate police power objectives. There, as here, the regulation in question

> Decreed a permanent ban on construction insofar as (petitioner's) lots were concerned, and that this prohibition deprive[d] (petitioner) of any reasonable economic use of the lots... eliminated the unrestricted right of use, and render[ed] them valueless, in accordance with the findings of the trial court.

Id., 505 U.S. __, 112 S. Ct. at 2890, 120 L. Ed. 2d at 809.

The *Lucas* Court emphasized that a landowner is categorically entitled to compensation where a regulation denies all economically beneficial or productive use of land or denies an owner all economically viable use of his land. *Id.*, 505 U.S. at __, 112 S. Ct. at 2895, 120 L. Ed. 2d at 815. The Supreme Court refers to no requirement or even consideration of the concept of "investment-backed expectation." It is simply not part of the standard to be considered nor is it part of the plaintiff's burden of proof where he has been deprived of all economically beneficial or productive use of land. The Supreme Court was explicit as to

the landowner's right to recover in exactly the situation in which the present petitioners find themselves:

> The . . . situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. *See Agins*, 447 U.S. at 260; *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (remainder of citations omitted). As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*. . . .

(Citations omitted) (emphasis supplied). *Id.*, 505 U.S. at __, 112 S. Ct. at 2893-2894, 120 L. Ed. 2d at 813.

Applying the explicit language of *Lucas* to the present case, the landowners needed to prove only that Ocean City's regulations with respect to Lot 1 denied them all economically beneficial or productive use of the land. There is no other requirement. In the case at bar, the trial court erroneously imposed on the petitioners the requirement of showing an investment-backed expectation of profit. There is no such requirement where the petitioners are deprived of the economically viable use of their land. If the jury had found that Ocean City's regulation deprived the petitioners of all economically viable use of Lot 1, petitioners were entitled to compensation without any further showing. Yet, the jury never considered that issue, because they were instructed to cease deliberations before reaching that threshold question. The petitioners below were entitled to a jury verdict based on the jury's consideration of the applicable principles of law. The

court's misapplication of the holding of *Lucas* constitutes plain error, and it deprived the petitioners of due process of law.

The very least that a litigant should expect when he appears before any court of these United States is to have his case decided in accordance with the principles of law established by the Supreme Court of the United States. When the courts below deviate so far from the law enunciated by this Court that the litigants are deprived of this most fundamental right of due process of law, this Court should take the extraordinary step of granting its Writ of Certiorari.

CONCLUSION

The Writ of Certiorari should be granted to provide a definition of the issue of what property interest may be delineated for purposes of analysis of whether or not a compensable taking has occurred. The Writ of Certiorari should also be granted to provide guidance to the courts below as to whether the plain error rule requires reversal when a jury is instructed contrary to this Court's specific holding in *Lucas v. So. Carolina Coastal Council*, 505 U.S. __, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 6, 1996

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5313

ALEXANDER STORER, JR.; DOROTHY J. STORER, his wife

v.

CITY OF OCEAN CITY, a municipal corporation, in the County of Cape May, State of New Jersey

Alexander Storer, Jr.; Dorothy J. Storer,

Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 94-cv-01681)
District Judge: Honorable Jerome B. Simandle

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 22, 1996
BEFORE: STAPLETON, COWEN and GARTH
Circuit Judges

(Filed FEB 6 1996)

Appendix A

MEMORANDUM OPINION

COWEN, *Circuit Judge*.

Plaintiff-appellants Alexander and Dorothy Storer brought this inverse condemnation action in the District Court for the District of New Jersey pursuant to 28 U.S.C. § 1332, seeking to obtain damages in excess of $700,000.00 by alleging that defendant Ocean City, pursuant to its zoning regulations, effected a "taking" of one of the plaintiffs' beachfront lots. A trial was held in which the jury ruled in Ocean City's favor. However, the manner in which the instructions were set forth on the jury form (although never objected to by plaintiffs' trial counsel) effectively foreclosed one of the plaintiffs' possible avenues to recovery. Therefore, in this case we must decide whether the district court's flawed instructions were sufficiently prejudicial to give rise to plain error. Because we conclude that plaintiffs have not demonstrated that this error was prejudicial, we will affirm the order of the district court.

I.

In April 1961, appellants Alexander and Dorothy Storer purchased two lots of beachfront property in Ocean City, New Jersey for $50,000.00. A duplex home was situated on Lot 9. Lot 1 consisted of vacant land. The two properties were purchased by way of a single deed. Alexander Storer testified at a deposition that $40,000.00 of the purchase price was allocated to the improved lot (Lot 9) and $10,000.00 was attributed to the vacant lot (Lot 1).

East of the duplex on Lot 9 is an unimproved street bed known as Wesley Avenue; east of Wesley Avenue is Lot 1. When

both of these lots were purchased in 1961, Lot 1 was not accessible by road. Ten years later, Ocean City vacated the street beds of Wesley Avenue beyond 29th Street, making the Storers the owners of the street beds adjacent to Lot 1 by operation of law. This provided the Storers with direct access to the improved end of 30th Street, thereby making Lot 1 accessible by road. The Storers contend that they were not aware of their new ownership interest until 1989, when they received a tax bill for their portion of the vacated street bed. At this time they sought to develop Lot 1, but their proposed actions were proscribed by certain local ordinances that had been enacted since the two lots were purchased in 1961.

Prior to 1971, no zoning regulations prohibited the Storers from developing Lot 1. In that year, the Commissioners of Ocean City passed an ordinance establishing a "Coastal Beach Zone." The Coastal Beach Zone encompassed all beachfront property in Ocean City over which the municipal government exercised authority, including Lot 1. No residential construction was permitted in the Coastal Beach Zone. Ten years later, a Flood Damage Prevention Ordinance was enacted. Pursuant to this ordinance, a permit had to be issued prior to any alteration of or construction on a sand dune. Lot 1 consists largely of dunes.

In 1985, Ocean City adopted Ordinance 85-6. This ordinance created the Beach and Dune Zone, which was essentially the same zone that had been established in 1971. The Beach and Dune Zone was established to protect Ocean City from flood damage during storms. No residential construction was permitted in the Beach and Dune Zone. In 1988, Ocean City adopted a Master Plan and a new comprehensive zoning ordinance in accordance with N.J. Stat. Ann. § 40:55-D-89. The 1988 ordinance contained Beach and Dune Zone provisions that mirrored those in Ordinance 85-6.

Appendix A

After a series of premature filings, this case was heard before the United States District Court for the District of New Jersey. The Storers survived a motion for summary judgment in an order dated December 7, 1994. A jury trial was held on March 13-15, 1995. The jury found that the Storers lacked an actual and reasonable expectation of developing Lot 1 when it was purchased in 1961. The instructions that the jury had been provided with required it to rule in defendant Ocean City's favor on the basis of this finding. Plaintiffs' counsel then filed a motion for a new trial pursuant to Fed. R. Civ. P. 59(a), on the grounds that the jury verdict was against the weight of the evidence and that the jury had exhibited bias and prejudice against the plaintiffs. Once again, counsel failed to object to the manner in which the jury was instructed. The district court denied the motion in an order dated April 19, 1995. This appeal followed.

II.

The Storers argue that under controlling case law they should not have been required to prove both that they had a reasonable investment-backed expectation to develop Lot 1 and that the property at issue had no economically viable use as a consequence of the Ocean City ordinances. Appellants are correct up until this point. They further argue that "[t]he misstatement of plaintiffs' burden of proof as conjunctive rather than disjunctive is plain error." Appellants' Br. at 9. This argument is without merit. *Cf. United States v. Turcks*, 41 F.3d 893 (3d Cir. 1994) (conspiracy charge given in the disjunctive rather than the conjunctive is not plain error), *cert. denied*, 115 S. Ct. 1716 (1995). The plain error doctrine is not so permissive as to permit us to reverse and remand this case on the present facts. Therefore, although the jury instructions were flawed, the judgment below will nonetheless be affirmed.

Appendix A

The flawed nature of the jury instructions becomes apparent upon review of the jury verdict form. The jury verdict form provided as follows:

> [1] Did the plaintiffs have an actual and reasonable expectation to develop Block 3000, Lot 1, when they purchased it in April, 1961?
>
> Yes _____ No _____
>
> If yes, proceed to interrogatory number 2. If no, cease your deliberations.
>
> [2] When the plaintiffs purchased the property in April 1961, was [sic] Block 3000, Lot 1 and Block 3000, Block 9, two separate parcels?
>
> Yes _____ No _____
>
> If yes, proceed to interrogatory number 3. If no, cease your deliberations.
>
> [3] Have these actions by the defendant City of Ocean City deprived plaintiffs of all of the economically viable use of their property?
>
> Yes _____ No _____
>
> If yes, proceed to interrogatory number 4. If no, cease your deliberations.

> [4] If a taking has occurred, what amount will reasonably compensate the plaintiffs for loss of use of the property?
>
> $ _____

Storer v. City of Ocean City, No. 94-1681, at 4 (D.N.J. Apr. 19, 1995).

These instructions did not account for the impact that the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S. Ct. 2886 (1992), could possibly have had on the instant case. The *Lucas* Court established a *per se* rule that if a state regulation deprives a property owner of all "economically viable use" of a piece of property, a compensable "taking" has occurred. *See id.* at 2895 ("when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, he has suffered a taking"). The *Lucas* Court's holding clearly means that courts are not to apply the reasonable investment-backed expectation balancing test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), if a land-use regulation is a taking *per se*. When a *per se* taking does not occur, the *Penn Central* balancing test applies. Therefore, the Storers conceivably could have prevailed in the district court under *Lucas* if the jury had found that Lots 1 and 9 should have been considered separately and that Lot 1 no longer had any economically viable use.

In light of the Supreme Court's decision in *Lucas*, this case should have been presented to the jury in the following terms. The dispositive issue here should have been whether the "relevant parcel" consisted of Lot 1 alone or Lots 1 and 9

together. In the language of takings law, the jury should first have been called upon to determine the composition of the "denominator parcel." A finding that Lots 1 and 9 were discrete properties would have inevitably led to a finding that a taking had occurred because defendant Ocean City conceded that "consistent with the Beach and Dune ordinances and the administrative action on plaintiffs' proposal for development, there is no economically viable use that Lot 1 may be put to." *Storer v. City of Ocean City*, No. 94-2277, at 6 (D.N.J. Dec. 7, 1994). Since there is no dispute that Lot 1 has no economically viable use at the present time, plaintiffs would then have been entitled compensation for defendant Ocean City's "taking" of Lot 1.

On the other hand, if the jury was to find that Lots 1 and 9 were intended to be a single parcel, only then should it have been asked whether the Storers were deprived of a reasonable investment-backed expectation. If the jury had then found that the Storers had a reasonable investment-backed expectation that was defeated by Ocean City's various land use regulations, then a taking occurred and the plaintiffs were entitled to compensation. If Lots 1 and 9 should have been treated as a single unit and, as the jury found here, no reasonable investment-backed expectation existed, only then should the jury have ceased its deliberations and ruled in favor of defendant Ocean City.

III.

The leading Supreme Court case on the relevant parcel issue is the Court's 1978 decision in *Penn Central Transportation Co. v. City of New York, supra*, in which the Court set forth what has become known as the "parcel as a whole" general rule. *Penn*

Central involved the application of New York City's Landmark Preservation Law ("the Landmark Law") to Grand Central Terminal ("the Terminal"). After the Terminal had been designated as a landmark, its owner applied for permission to build an office building on the top of the Terminal. When this request was denied on the grounds that the proposed construction would destroy the Terminal's aesthetic appeal, plaintiffs filed suit alleging that the Landmark Law effected a taking of the airspace above the Terminal.

The Supreme Court rejected Penn Central's challenge. Addressing the relevant parcel issue, Justice Brennan stated that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the property as a whole — here the city block designated as the "landmark site."

Penn Central, 438 U.S. at 130-31, 96 S. Ct. at 2662. In defining an entire city block as the denominator parcel as opposed to holding that the landmark itself was the relevant parcel, the *Penn Central* decision favors a expansive interpretation of what a relevant parcel should be comprised of. By looking to *Penn Central* for guidance, the court below could easily have found in favor of defendant Ocean City on this issue.

Appendix A

Penn Central's expansive conception of the relevant parcel was criticized in *dictum* in the Court's decision in *Lucas*. In a footnote, Justice Scalia recognized the Court's failure to provide adequate guidance on the relevant parcel issue:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or in one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme, and, we think, unsupportable view of the relevant calculus, *see Penn Central* . . . , where the state court examined the diminution in a relevant parcel's value produced by a municipal ordinance in light of the total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, the uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. *Compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S. Ct. 158, 160 (1922) (law restricting subsurface

> extraction of coal held to effect a taking), *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502, 107 S. Ct. 1232, 1248-51 (1987) (nearly identical law held not to be a taking) . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value . . .

Lucas, 112 S. Ct. at 2893 n.7 (emphasis added). Although this *dictum* encouraged the application of state law principles to help decide what properties should be included in the denominator parcel, state law principles are not very helpful here. The New Jersey Supreme Court has not addressed this specific issue and has generally deferred to the High Court's interpretation of the proper scope of the Takings Clause. *See Bernardsville Quarry Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1381 (N.J. 1992) (in a case decided less than a month after *Lucas*, the court observed that "The protections afforded under both constitutions, article I, paragraph 26 of the New Jersey Constitution and the Fifth and Fourteenth Amendments to the United States Constitution are coextensive") (citations and internal quotation marks omitted); *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 257 (N.J. 1991) (noting that New Jersey state and federal constitutional principles "are in general conformity").

From the Storers' perspective the state of the law on the relevant parcel issue is at worst unfavorable, *see Penn Central, supra*, and at best uncertain. It is therefore impossible to say with any degree of probability that the jury, if instructed properly, would have found Lot 1 and Lot 9 to be separate parcels.

IV.

The Supreme Court's most recent pronouncement of the plain error rule was set forth in *United States v. Olano*, __ U.S. __, 113 S. Ct. 1770 (1993). The *Olano* Court interpreted the scope of Rule 52(b) of the Federal Rules of Criminal Procedure to be

> circumscribed. There must be "error" that is "plain" and that "affects substantial rights." Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion unless the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1776 (citations and alterations omitted).

"A deviation from a legal rule is error." *United States v. Turcks*, 41 F.3d at 897. The district court's flawed jury instructions satisfy this threshold requirement. "A 'plain' error is 'clear' or 'obvious.' " *Id.* Similarly, the district court's jury instructions ignored obvious precepts of present-day takings doctrine. "In most cases, an error will be deemed to have 'affected substantial rights' where it is prejudicial. Prejudicial

error, affecting substantial rights, must have 'affected the outcome of district court proceedings.' " *Id.* (quoting *Olano*, 113 S. Ct. at 1778). The party seeking relief based on the alleged plain error has the burden of proving prejudice. The Storers have failed to carry this burden. *Olano*, 113 S.Ct. at 1777.

The Court's decision in *Penn Central* provides strong authority for defendant Ocean City on the dispositive relevant parcel issue. In light of this, we cannot say with any confidence that the Storers would have prevailed on their inverse condemnation claim if the jury had been instructed properly. There is an excellent chance that plaintiffs still would have lost. Although it is possible that the Storers could have prevailed if the jury had been instructed properly (or if trial counsel had objected to the erroneous instructions and had them corrected), such highly speculative tort recoveries do not fall within the purview of the plain error rule. Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Opinion.

s/ Robert E. Cowen
United States Circuit Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 6, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5313

ALEXANDER STORER, JR.;
DOROTHY J. STORER, his wife

v.

CITY OF OCEAN CITY, a municipal corporation, in the County of Cape May, State of New Jersey

Alexander Storer, Jr.; Dorothy J. Storer,

Appellants

On Appeal from the United States District Court for the District of New Jersey
(D.C. No. 94-cv-01681)

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 22, 1996
BEFORE: STAPLETON, COWEN and GARTH
Circuit Judges

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on January 22, 1996.

On consideration whereof, it is now here ordered and adjudged that the judgment of the District Court entered on April 24, 1995, be and the same hereby is affirmed in all respects.

Costs taxed against appellants.

ATTEST:

s/ P. Douglas Sisk
Clerk

APPENDIX C — OPINION OF THE HONORABLE JEROME B. SIMANDLE, UNITED STATES DISTRICT JUDGE FILED APRIL 19, 1995

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 94-1681 (JBS)

ALEXANDER STORER, JR., and DOROTHY J. STORER,

Plaintiffs,

v.

CITY OF OCEAN CITY, a Municipal Corporation, in the County of Cape May, State of New Jersey,

Defendant.

OPINION

APPEARANCES:

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Appendix C

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Attorneys for Defendant

SIMANDLE, District Judge:

This case arose under the Fifth Amendment to the United States Constitution. Plaintiffs alleged that their beach-front property was the subject of a regulatory "taking" requiring just compensation under that amendment, and that no compensation had been tendered. After the court's denial of defendant's motion for summary judgment, the matter proceeded to trial before a jury. The trial lasted three days, proceeding on March 13, 14 and 15, 1995. Plaintiffs sought $775,000.00 in damages for the alleged taking of their vacant beach-front lot by defendant, City of Ocean City. The jury unanimously found for the defendant. The matter is presently before the court upon the motion of plaintiffs for a new trial pursuant to Fed.R.Civ.P. 59(a).

Background

The following background facts were undisputed at trial. In April, 1961, plaintiffs, Alexander and Dorothy Storer, purchased two lots of property in Ocean City, New Jersey, for a total of $50,000. Lot 9, Block 301, contained a duplex home, and Lot 1, Block 3000, consisted of vacant land. The two properties were purchased by way of a single deed. Lot 9 contained a duplex located on the corner of 30th Street and Central Avenue and

assigned the addresses 3000 and 3002 Wesley Avenue. East of the duplex is an unimproved street bed known as Wesley Avenue; east of the Wesley Avenue street bed is Lot 1. Because that portion of Wesley Avenue was not developed, Lot 1 was not accessible by road at the time of the purchase in 1961. Some ten years later, in 1971, the City officially vacated the street beds of Wesley Avenue beyond 29th Street. By operation of law, the parties agree that plaintiffs became owners of the vacated street beds adjacent to Lot 1. When the vacated street bed was added to Lot 1, plaintiffs acquired direct access to the improved end of 30th Street, thus making Lot 1 accessible by road. In the meantime, in June 1988, the defendant adopted a zoning and land development ordinance and zoning map which placed Lot 1 and similar property into a "Beach and Dune Zone" which prohibits construction of buildings and permits passive recreational uses. When plaintiffs learned of this development, which, according to plaintiffs, was not until 1989 the date they first received a tax bill for the portion of the vacated street bed, they sought to develop Lot 1. However, certain local ordinances prevented plaintiffs from doing so. These local regulations form the basis of plaintiffs' takings claim.

As the court explained to the jury in its preliminary instructions, the plaintiffs were charged with proving the following three elements by a preponderance of the evidence:

1. That the two lots should be considered separate, rather than one parcel, in terms of the owners' reasonable expectations when they bought them.

2. That the impact of the regulations denies to the owners all practical use of the

property in Lot 1, that is, that it substantially destroys the beneficial use of private property when considering the parcel as a whole.

3. That the owners actually had a reasonable investment-backed expectation in 1961, when they purchased these lots, that they intended building on Lot 1, which has been extinguished by the defendant's regulations. In other words, you must determine whether these plaintiffs actually assumed in 1961 that they could have developed Lot 1, and whether they intended to do so, and whether their expectations were reasonable under all the circumstances.

The court explained, by way of both the preliminary instructions and the final charge to the jury, that if the plaintiffs proved each of these three elements of liability, they have succeeded in established a "taking" of their property, and the jury was to then consider the amount of fair compensation to be awarded for such a taking.

The jury verdict form mirrored these instructions.[1] It read, in its entirety:

We the unanimous Jury find as follows:

1. Did the plaintiffs have an actual and reasonable expectation

1. Neither party objected to the preliminary or final jury instructions nor the jury verdict form, which were developed with the collaboration of counsel and court.

to develop Block 3000, Lot 1, when they purchased it in April, 1961?

Yes _____ No _____

If yes, proceed to interrogatory number 2. If no, cease your deliberations.

2. When the plaintiffs purchased the property in April, 1961, was Block 3000, Lot 1 and Block 3000, Lot 9 two separate parcels?

Yes _____ No _____

If yes, proceed to interrogatory number 3. If no, cease your deliberations.

3. Have these actions by the defendant City of Ocean City deprived plaintiffs of all economically viable use of their property?

Yes _____ No _____

If yes, proceed to interrogatory number 4. If no, cease your deliberations.

4. If a taking has occurred, what amount will reasonably compensate the plaintiffs for loss of use of the property?

$ _____

The jury deliberated for approximately an hour before returning a verdict in favor of defendant upon finding for

defendant on special interrogatory number one. Plaintiffs seek a new trial on the ground that the jury ignored the great weight of the evidence when it found that plaintiffs did not have an actual and reasonable expectation to develop Lot 1 when they purchased it in 1961. More specifically, plaintiffs argue that "[t]he rapid decision of the jury, in light of the overwhelming evidence of plaintiffs' intent and expectation to realize a return from the purchase of Lot 1 in 1961, demonstrates bias and prejudice against plaintiffs' case, and must be set aside, as a miscarriage of justice, and a new trial granted." Br. at 4.

Discussion

A motion for a new trial under Rule 59(a), Fed.R.Civ.P., should be granted when, in the opinion of the district judge, " 'the verdict is contrary to the great weight of the evidence, thus making a new trial necessary to prevent a miscarriage of justice.' " *Fineman v. Armstrong World Industries, Inc.*, 774 F. Supp. 266, 268 (D.N.J. 1991), *aff'd*, 980 F.2d 171 (3d Cir. 1992) (quoting *Roebuck v. Drexel University*, 852 F.2d 715, 736 (3d Cir. 1988)). Granting a new trial under the Rule is almost entirely committed to the sound discretion of the trial judge. *Id.* In addition, courts have held that a dispute over credibility does not justify a new trial. *Consumers Power Co. v. Curtis-Wright Corp.*, 780 F.2d 1093, 1097 (3d Cir. 1986) (citing cases).

In the present case, the verdict was not contrary to the weight of the evidence. In reaching a decision on the first interrogatory, the jury was presented with a classic credibility determination of the type committed entirely to the province of the jury. Specifically, testimony on the question of the actual expectations of plaintiffs with regard to Lot 1 when they purchased it in 1961 was provided exclusively by plaintiffs

themselves. Plaintiffs testified to the effect that, at the time they purchased the two lots, they intended to build their "dream house" on Lot 1.

Defense counsel effectively challenged this testimony by various means. Through cross-examination,[2] defense counsel brought out the fact that the building of the "dream house" on Lot 1 would cause the duplex on Lot 9, which was currently beach-front property, to lose its ocean view and beach-front status. Defense counsel adduced that the two lots were purchased by way of a single deed, with the duplex being the initial focus of the purchase and Lot 1 having been added to the sale on the advice of the realtor to the effect that Wesley Avenue was going to be completed in the future, and that if plaintiffs didn't buy Lot 1, located between Lot 9 and the ocean, somebody else could purchase it and build upon it, and plaintiffs would no longer have beachfront property.

The jury's determination that plaintiffs did not have an actual and reasonable expectation to develop Lot 1 when they purchased it in 1961 is further supported by the circumstantial evidence. Never did plaintiffs claim that their goal in 1961 was to purchase vacant land and develop it. They told their realtor they sought a beachfront house, and he showed them several such properties including Lot 9 with its duplex. They never inspected any vacant beachfront property with an eye toward later development. The attributes of the beachfront duplex on Lot 9 in 1961 persist today; the panoramic views, the direct beach access, the nearness to the surf, just as they purchased it.

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2. With the exception of a brief reading from the transcript of the deposition of Dr. Storer, defendant put on no defense case after plaintiffs rested.

Appendix C

From 1961 to 1989, plaintiffs never consulted the City of Ocean City with an eye toward developing Lot 1, nor did they retain the services of an attorney, an engineer, or an architect, to inquire into the status of Lot 1 and whether the alleged plans of the City to extend Wesley Avenue might come to fruition. The inaction for almost 30 years is evidence of lack of an actual expectation of building upon the lot. The jury could well have been negatively impressed by the fact that plaintiffs took no such steps toward developing Lot 1 until after 1989 when they were told of the impossibility of constructing a dwelling upon the property. The jury may well have considered that the plaintiffs' commissioning of an architect in 1989 to design their new beachfront house was an empty paper exercise, rather than their real plan, since neither Dr. nor Mrs. Storer ever discussed with the architect what sort of design they wanted, nor any of the attributes to this supposed dream house.

Moreover, the jury could well have found that the angle of the beach itself made it unrealistic for anyone in 1961 to suppose that beachfront development would be permitted south of 29th Street, where Wesley Avenue ended. As one goes south from 29th Street the waterline moves increasingly westerly, and no parcel has been built as close to the water in this area as Lot 1 would have been. Moreover, defense counsel pointed out, through cross-examination and closing argument, that plaintiffs had a significant stake in convincing the jury that they had an actual expectation to develop Lot 1 when they purchased in 1961, because they were seeking a $775,000.00 recovery in the instant suit; due to plaintiffs' self-interest, the jury could give lesser weight to plaintiffs' professed intent than to their actual deeds.

Clearly, defense counsel was properly performing his duties in challenging plaintiffs' credibility on this critical point. The

realtor who had assisted plaintiffs in the purchase of the two lots was deceased, making plaintiffs the only witnesses competent to testify to their intentions with regard to Lot 1 in 1961. Defense counsel had an obligation, on behalf of his client, to emphasize that plaintiffs' testimony served their own financial interests.[3] It was for the jury to assess the credibility of plaintiffs' testimony in light of this, and other, facts. Just because plaintiffs testified to their intentions does not make it so, and the jury was free to reject their version of pertinent events, especially in light of the compelling evidence brought out through defense counsel's skillful cross-examination.

A closing argument may contain zealous advocacy as long as it is fair comment on the evidence in the case. *Draper v. Airco, Inc.*, 580 F.2d 91, 97 (3d Cir. 1978). Defense counsel never overstepped these bounds. For instance, he never ventured an opinion as to his personal belief of credibility. *Id.* at 96. He referred to no matters not in evidence. *Ayoub v. Spencer*, 550 F.2d 164, 170 (3d Cir. 1977). He made no appeals, overt or covert, to passion, prejudice or sympathy. *Sales by Sales v. Wang*, 846 F.2d 897 (3d Cir. 1989). He did nothing to disparage or belittle the efforts of his opponent. *Draper*, 580 F.2d at 96. While a new trial can be ordered if an attorney's improper conduct has, with reasonable probability, influenced the jury's verdict, *Associated Business Telephone Systems Corp. v. Greater Capital Corp.*, 729 F. Supp. 1488, 1504 (D.N.J.), aff'd, 919 F.2d 133 (3d Cir. 1990), no such conduct has occurred here. Plaintiffs' assertion that defense counsel characterized them as "money grabbers" is

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3. No objection was made to the defense summation at the time, thus depriving the court of the opportunity to deliver a curative instruction if appropriate. In any event, the court finds that defense counsel did not inappropriately attempt to prejudice the jury; rather, defense counsel's remarks were entirely proper.

incorrect; no such term was used. Instead, defense counsel appropriately touched upon monetary aspects of the case to make two points — that the case is "about money," *i.e.*, plaintiffs seek $775,000 in damages to compensate them for inverse condemnation, and that plaintiffs' self-interest in a favorable outcome can be considered in assessing their bias or credibility as witnesses. Both are fair points, and neither point can be said to have probably inflamed the jury and blinded them to the evidence.

Overall, the defense closing was a thorough review of the evidence, both favorable and unfavorable to the defendant, knit together with commendable skill and accuracy, delivered in a fully professional and utterly unobjectionable manner.

In short, the court can discern no basis for disturbing the jury's verdict.[4] Certainly the mere fact that the jury did not take long to reach a decision is not a ground upon which to premise a finding of a miscarriage of justice. Plaintiffs have failed to bring anything to the court's attention which could conceivably entitle them to a new trial. Accordingly, plaintiffs' motion will be denied.

The accompanying Order is entered.

April 19, 1995
Date

Jerome B. Simandle
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

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4. Indeed, the court delivered a separate jury instruction which included the caution that the jury's deliberations should not be "affected or diverted by any appeal to bias, passion or prejudice." Jury Instructions, p. 35.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 19, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 94-1681 (JBS)

ALEXANDER STORER, JR., and DOROTHY J. STORER,

Plaintiff,

v.

CITY OF OCEAN CITY, a Municipal Corporation, in the County of Cape May, State of New Jersey,

Defendant.

ORDER

This matter having come before the court upon the motion of plaintiffs for a new trial pursuant to Fed.R.Civ.P. 59(a); and the court having considered the submissions of the parties; for the reasons stated in the Opinion of today's date;

IT IS this 19th day of April, 1995 hereby

ORDERED that plaintiff's motion for a new trial is DENIED.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

APPENDIX E — OPINION OF THE HONORABLE JEROME B. SIMANDLE, UNITED STATES DISTRICT JUDGE FILED DECEMBER 7, 1994

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 94-2277 (JBS)

ALEXANDER STORER, JR., and DOROTHY J. STORER,

Plaintiffs,

v.

CITY OF OCEAN CITY, a Municipal Corporation, in the County of Cape May, State of New Jersey,

Defendant.

OPINION

APPEARANCES:

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Appendix E

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SIMANDLE, District Judge:

This case arises under the Fifth Amendment to the United States Constitution. Plaintiffs allege that their beach-front property was the subject of a regulatory "taking" requiring just compensation under that amendment, and that no compensation has been tendered. The matter is before the court upon plaintiff's motion for partial summary judgment on the issue of liability and upon the cross-motion of defendant for summary judgment.

Factual and Procedural Background

The following background facts are undisputed. In April, 1961, plaintiffs, Alexander and Dorothy Storer, purchased two lots of property in Ocean City, New Jersey, for a total of $50,000. Lot 9, Block 3001, contained a duplex home, and Lot 1, Block 3000, consisted of vacant land. The two properties were purchased by way of a single deed. Although the deed itself does not so indicate, plaintiff Alexander Storer ("Dr. Storer") indicated at deposition that $40,000 of the purchase price was allocated to the improved lot and $10,000 allocated to the vacant lot. Deposition of Dr. Storer, 9/16/92 at 6.

Lot 9 contained a duplex located on the corner of 30th Street

and Central Avenue and assigned the addresses 3000 and 3002 Wesley Avenue. Storer Dep. at 18:22-19:11. East of the duplex is an unimproved street bed known as Wesley Avenue; east of Wesley Avenue is Lot 1. Because that portion of Wesley Avenue was not developed, Lot 1 was not accessible by road at the time of the purchase in 1961. Some ten years later, in 1971, the City officially vacated the street bed of Wesley Avenue beyond 29th Street. By operation of law, the parties agree that plaintiffs became owners of the vacated street beds adjacent to Lot 1. When the vacated street bed was added to Lot 1, plaintiffs acquired direct access to the improved end of 30th Street, thus making Lot 1 accessible by road. When plaintiffs learned of this development, which, according to plaintiffs, was not until 1989, the date they first received a tax bill for the portion of the vacated street bed, they sought to develop Lot 1. However, certain local ordinances prevented plaintiffs from doing so.

A brief outline of Ocean City regulatory activities bearing on plaintiffs' ability to develop Lot 1 follows. Prior to 1971, there were no zoning regulations which applied to Lot 1. Dep. of John R. Gideonse, PP, AICP, at 17:11-15.[1] In 1971, the Commissioners of Ocean City adopted an ordinance establishing a Coastal Beach Zone. *Id.* at 18:9-18. That ordinance applied to all beachfront property in Ocean City over which the Ocean City government exercised authority, including Lot 1. *Id.* at 19:9-15. The Coastal Beach Zone established by the 1971 ordinance corresponds with the bulkhead line. *Id.* at 19:23-25. No residential construction was permitted in the Coastal Beach Zone. *Id.* at 20:9-11.

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1. Mr. Gideonse was Planning Director for the City of Ocean City for ten years at the time of his *de bene ese* deposition on September 22, 1994.

Appendix E

In April, 1981, the Flood Damage Prevention Ordinance was adopted. *Id.* at 20:12-17. That ordinance prohibits the alteration of any sand dune. Pursuant to the ordinance, a permit must be issued prior to any alteration or construction on a dune. Ex. "E" to Def. Br. It is undisputed that Lot 1 consists largely of dunes.

In 1985, the city adopted Ordinance 85-6. Gideonse Dep. at 23:22-24. That ordinance created the Beach and Dune Zone, which was "essentially the same zone that was previously established in 1971." *Id.* at 24:6-14. No residential construction was permitted in the Beach and Dune Zone. *Id.* at 25:7-9. In 1988, the City adopted a Master Plan and a new comprehensive zoning ordinance in accordance with N.J.S.A. § 40:55-D-89. *See* Ex. "G" to Def. Br. The 1988 ordinance contains a Beach and Dune Zone identical to the 1985 Beach and Dune Zone. Gideonse Dep. at 29:4-11. The purpose of the Beach and Dune Zone was to protect Ocean City from flood damage during storms. *Id.* at 27:20-23.

Plaintiffs have, since 1992, sought to build on Lot 1 and have been denied permits under applicable regulations. It is plaintiffs' contention that they intended to develop Lot 1 since the time they purchased it in 1961, and that the actions of defendant in adopting regulations which restrict economic use of plaintiffs' property constitute a taking of plaintiffs' property for public use for which just compensation must be paid under the fifth and fourteenth amendments to the United States Constitution.

After a series of premature filings, the matter is ripe for review on the merits.[2]

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2. Plaintiffs filed an action in this court regarding the same piece of

(Cont'd)

Appendix E

Discussion

Plaintiffs' partial summary judgment motion and defendants' summary judgment motion are discussed together

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(Cont'd)
property, including virtually identical allegations as those asserted here, in December 1989. In March 1991, the Honorable John F. Gerry dismissed that action without prejudice holding, *inter alia*, that plaintiffs' takings claim was not ripe for adjudication because plaintiffs had not yet exhausted their administrative remedies by applying for building and development permits, or for variances from the Ordinance ("Use Variance"). *See Storer and Storer v. City of Ocean City*, C.A. No. 89-5247, slip op. at 11, (D.N.J. March 8, 1991).

In July 1991, plaintiffs filed a Complaint in the New Jersey Superior Court, Law Division, Cape May County. *See* Def. Br., Ex. D. This Complaint also concerned the property at issue in the instant action, and sought, like here, a declaration that the Ordinance constituted a taking of property, as well as damages for inverse condemnation. The Superior Court dismissed the Complaint without prejudice on October 11, 1991.

The plaintiffs thereafter submitted, on March 1, 1992, an application for a Use Variance seeking approval from the Ocean City Zoning Board of Adjustment for construction of a two family home on the subject property. The Zoning Board denied plaintiffs' application for a variance on April 15, 1992. The plaintiffs never attempted, however, to comply with the City's Flood Damage Prevention Ordinance, Ord. No. 89-23, Def. Br., Ex. I. Compliance with the Flood Damage Prevention Ordinance is a prerequisite to obtaining a building permit. Thus, plaintiffs were required to so comply by order of this court dated October 18, 1993 denying plaintiff's motion to reinstate a second previous complaint filed in this court.

Plaintiffs have since exhausted their administrative remedies under the Flood Damage Prevention Ordinance, having had their appeal denied by the Flood Damage Prevention Appeal Board on January 31, 1994. Defendant does not dispute that administrative remedies have been properly exhausted.

herein, as they are essentially mirror images of one another. The question is whether any genuine issues of material fact exist on the point of whether the Ocean City ordinances at issue constitute a taking of plaintiffs' property within the meaning of the fifth amendment. We analyze the elements of a fifth amendment taking in turn.

The fifth amendment provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." Prior to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the amendment was thought to apply only to physical appropriations of private property. In that seminal case, the Court recognized the principal that government regulation of private property, if it "goes too far," also constitutes a taking. The touchstone of the analysis is whether the regulation deprives the property owner of the owner's reasonable investment-backed expectations. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

On this point, the court must inquire whether plaintiffs have been "called upon to sacrifice *all* economically beneficial uses" of their land by virtue of defendant's regulatory activity. *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886, 2895 (1992) (emphasis original). If the plaintiff property owners have been called upon to leave their property "economically idle", they may have suffered a taking. *Id.* Here, there is no dispute that plaintiffs may not develop Lot 1. The parties do not dispute that, consistent with the Beach and Dune Zone ordinances and the administrative action on plaintiffs' proposal for development, there is no economically viable use that Lot 1 may be put to.

Defendants focus the court's attention, however, on the

threshold question of whether Lot 1, standing alone, is the relevant segment of real property for purposes of this economic futility analysis. That is, if Lot 1 is actually part of a larger tract of property including Lot 9 owned by plaintiffs, so long as Lot 9 continues to have economic value, there has been no taking. In performing a takings analysis, the pertinent question is whether the property as a whole has been deprived of all economic value, not whether some unit of the property has been deprived of economic value. Thus, in *Penn Central Transp. Co., supra*, the Court rejected the notion that the pertinent inquiry for fifth amendment purposes was whether the City of New York had deprived plaintiff of all gainful use of the valuable airspace above Grand Central Station in designating the building a landmark and refusing to issue permits for the development of an office tower above the terminal. Rather, the Court found that it was the whole of the property — there, the city taxblock designated as a landmark site — that was the pertinent unit of property for the takings analysis:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole — here, the city tax block designated as the "landmark site."

Id., 438 U.S. at 130. *See also Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 497 (1987) ("Because our test for

regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' ").

Unfortunately, the Supreme Court has not further defined the inquiry for district courts faced with the "critical question" of defining the relevant unit of property. We find helpful the application of these general principles by the court in *Ciampitti v. United States*, 22 Cl.Ct. 310 (1991):

> In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity required a buffer, for example, around a housing development, a court would not entertain a separate claim for the land dedicated to buffer. It would no doubt take into consideration the extent to which the whole parcel could be developed. Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The

> effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.

Id. at 318-19.

In *Ciampitti*, the plaintiff purchased 45 acres of land, containing a significant number of lots which were wholly or partially designated as wetlands by the state prior to the purchase. Plaintiff was denied permission to fill and construct on certain of the wetland areas. Ultimately, his activities in the area were the subject of a cease and desist order from the Army Corps of Engineers. Based largely upon plaintiff's testimony at trial, the court found that from plaintiff's standpoint at the time of the purchase of the 45 acres, the entire 45 acres was viewed as a single parcel, even though the eastern and western portions of the land were not contiguous. *Id.*, 22 Cl.Ct. at 319. The court explained that "[i]t would be inappropriate to allow [plaintiff] to sever the connection he forged when it assists in making a legal argument." *Id.* at 320. "Ciampitti is, in effect, asking to isolate the least valuable portion of the purchase when he himself saw the parcels as inextricably linked in September 1983." *Id.* Thus, the court concluded that the "parcel as a whole" must include the valuable portion of the purchase, thus negating the possibility that there had been a "taking." *Id.*

In *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), the court was also called upon to evaluate the threshold question of whether a parcel of land subject to regulations prohibiting development should be considered part of a larger tract of land also owned by plaintiff, which was not subject to the regulatory restrictions on development. In that case, the two tracts were contiguous. The district court entered

summary judgment in favor of the defendant, finding, as a matter of law, that the two tracts must be considered a single parcel, and that plaintiff's ability to earn a reasonable return on his investment in the parcel as a whole precluded a finding that there was a fifth amendment "taking." *Id.* at 368.

The Court of Appeals reversed the district court's decision, finding that the question of whether the two parcels were appropriately considered as one was a factual issue upon which summary judgment was inappropriate. *Id.* at 371. In determining that there was a factual dispute, the court relied, in part, on the very fact that the two areas had been subjected to different zoning regulations. *Id.*

We are thus informed by the cases that a fact-sensitive inquiry must be performed in order to determine whether Lots 1 and 9 are properly considered a single parcel of land for purposes of the present takings analysis. The record reveals that both lots were transferred by way of a single deed in April, 1961, from a single seller. Dr. Storer Dep. at 32:16-18. The lots were not originally contiguous, although they were always closely connected and, subsequent to the city's abandonment of the Wesley Avenue street bed between the lots, the two lots became contiguous. Moreover, by Dr. Storer's own admission, he was originally interested only in Lot 9 (the lot containing the duplex), but purchased Lot 1 upon advice of his realtor in order to protect his beachfront view.[3] Dr. Storer's deposition suggests that the

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3. The pertinent deposition testimony on this point is as follows:

> Q: What information did you have, at the time that you purchased the property, that the city intended to improve Wesley Avenue?

(Cont'd)

purchase of Lot 1 was thus part and parcel of the purchase of Lot 9, and at least a major purpose (if not the sole purpose) of the

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(Cont'd)

A: The information — the only information that we had was from Robert Monihan.

Q: He was the realtor, correct?

A: He was the realtor [who] sold us the property.

Q: What did he tell you?

A: He told us that the street was gonna go through, and that we had better buy the lot in front because if we didn't, somebody was going to build out there and we would not have a beachfront property.

Q: Okay. Now, when did Mr. Monihan tell you that?

A: He told us after we had agreed to buy the duplex. Then he brought up this question of the lot in front, which I didn't even know there was a lot out there. And he brought it up and showed us the tax map that plotted the lots, the streets that were plotted, and said, This is going to go through and if you want to have a beachfront property, you had better buy this lot.

. . .

Q: When you initially agreed to purchase your duplex property, were you aware that Wesley Avenue was immediately east of your property, or did Mr. Monihan bring that to your attention, as well?

(Cont'd)

purchase of the additional land was to protect the oceanfront view from the duplex located on Lot 9. It was the duplex plaintiffs were interested in. Dep. of Dr. Storer at 31:3-6. In addition, on the question of the extent to which the protected lands (Lot 1) enhance the value of the remaining lands (Lot 9), the fact that Lot 9 retains its beachfront view can only enhance the value of Lot 9 and the duplex it contains. Plaintiffs earn $13,000 for renting out the lower unit out of the duplex during the

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(Cont'd)

A: He later brought that to our attention as the process of selling went on.

Q: As I understand it, after you had originally agreed to purchase the duplex, Mr. Monihan came to you and explained to you that there was another lot east of you, which now is lot Block 3000, Lot 1, and suggested to you that you buy that to preserve the fact — to preserve your view and so that no one would ever be able to build in front of you?

A: That's essentially correct, but it was in the process of buying the building.

Q: And you later then purchased everything; is that correct?

A: Correct.

Q: And you purchased it in one deed; is that correct?

A: It was all put on one deed, yes.

Dep. of Dr. Storer at 29:19-30:16; 31:22-32:18.

summer months, and the assessed value of Lot 9 alone, which was purchased for less than $50,000 in 1961, is $794,500.00. Dep. of Dr. Storer at 12:12-14; 14:15-18. Although the property would continue to be valuable even if Lot 1 were developed, the fact that Lot 1 remains undeveloped means Lot 9 is "beachfront" property, no doubt further enhancing its value.

On the other hand, the two lots are subject to very different regulatory schemes. Plaintiff is entitled to the inference that Lots 1 and 9 were separate parcels in 1961, and that the duplex on Lot 9 could have been purchased without including Lot 1 in the deal. This would support plaintiff's assertion that in 1961 Lot 1 could have been separately developed and had a value separate from Lot 9. Plaintiff could also reasonably ask a fact-finder to infer that the defendant itself intended to permit such development as of 1961, since the defendant's street plan included providing road access to serve Lot 1 by extending Wesley and/or by extending 30th Street. In addition, plaintiff points out that defendant City has taxed the two lots separately "for the past 33 years." Reply Br. at 2. Plaintiff also notes that the two lots have separate addresses for purpose of city tax records. The court is constrained to conclude, on the present record, that summary judgment is inappropriate, because these material facts are in dispute.

The standard for granting summary judgment is a stringent one. A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See Hersh v. Allen Products, Co., Inc.*, 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir. 1983). In

deciding whether there is a disputed issue of material fact the court must view all inferences, doubts and issues of credibility in favor of the non-moving party. *See Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983), *cert. denied*, 465 U.S. 1091 (1984); *Hancock Industries v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987) (citation omitted). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Recent Supreme Court decisions mandate that "a motion for summary judgment must be granted unless the party opposing the motion can produce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring) (citing *Anderson*, 477 U.S. 242, and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Moreover, once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

Although this is a close call, we conclude that the question of whether the two lots should be treated as on for purposes of a fifth amendment analysis is a factual issue which must be resolved by the trier of fact. Plaintiff's evidence is sufficient to withstand a motion for summary judgment; accordingly,

summary judgment will not be awarded to either party on this ground.[4]

Conclusion

For the reasons stated herein, the court will deny plaintiffs' motion for partial summary judgment and defendant's cross-motion for summary judgment. An appropriate Order follows.

December 7, 1994
Date

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

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4. We also conclude that summary judgment is inappropriate on the additional issue of whether, at the time plaintiffs purchased the two lots in 1961, plaintiffs reasonably expected to earn a return by developing Lot 1. Although the deposition testimony set forth in footnote 3, *supra*, strongly suggests that plaintiffs did not contemplate building on Lot 1 but rather were attempting merely to preserve their view from the duplex on Lot 9, there is some additional testimony which may support the view that plaintiffs may have had an intention to develop Lot 1 in the future, when Wesley Avenue was completed, affording access to the property. *See* Dep. of Dr. Storer at 38:16-22; Dep. of Mrs. Storer at 93:17-94:1.

APPENDIX F — TRANSCRIPT OF TRIAL BEFORE THE HONORABLE JEROME B. SIMANDLE DATED MARCH 13, 1995 (PORTION OF JUDGE'S COMMENTS TO JURY) [PAGES 10-11]

[10] THE DEFENDANT, CITY OF OCEAN CITY, DENIES THAT ANY TAKING HAS OCCURRED, OR THAT ANY COMPENSATION IS DUE UNDER THE CIRCUMSTANCES OF THIS CASE. THIS PORTION OF THE FIFTH AMENDMENT PROVIDES THAT PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION. A GOVERNMENTAL REGULATION CAN AMOUNT TO A TAKING, EVEN IF THE GOVERNMENT DOES NOT PHYSICALLY APPROPRIATE THE PROPERTY, IF THE REGULATION IS FOR THE PURPOSE OF A PUBLIC USE, AND IF THE REGULATION DEPRIVES THE PROPERTY OWNER OF THE OWNER'S REASONABLE INVESTMENT BACKED EXPECTATIONS OF AN APPROPRIATE USE.

IN ORDER TO PREVAIL IN THIS CASE, THE PLAINTIFFS HAVE THE BURDEN OF PROVING EACH OF THE FOLLOWING ELEMENTS OR INGREDIENTS BY A PREPONDERANCE OF THE EVIDENCE, AND YOU, THE MEMBERS OF THE JURY, WILL BE MAKING YOUR FACT FINDINGS IN CONNECTION WITH THESE ELEMENTS THAT I'LL SUMMARIZE FOR YOU NOW. FIRST, PLAINTIFFS MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE TWO LOTS SHOULD BE CONSIDERED SEPARATE RATHER THAN ONE PARCEL IN TERMS OF THE OWNER'S REASONABLE EXPECTATIONS WHEN THEY BOUGHT THEM.

SECOND, THAT THE IMPACT OF THE REGULATIONS DENIES TO THE OWNERS ALL PRACTICAL USE OF THE

PROPERTY IN LOT 1, THAT IS, THAT IT SUBSTANTIALLY DESTROYS THE BENEFICIAL USE OF PRIVATE PROPERTY WHEN CONSIDERING THE PARCEL AS A WHOLE.

THIRD, THAT THE OWNERS ACTUALLY HAD A REASONABLE [11] INVESTMENT BACKED EXPECTATION IN 1961 WHEN THEY PURCHASED THESE LOTS THAT THEY INTENDED TO BUILD ON LOT 1, WHICH HAS BEEN EXTINGUISHED BY THE DEFENDANT'S REGULATIONS. IN OTHER WORDS, YOU MUST DETERMINE WHETHER THESE PLAINTIFFS ACTUALLY ASSUMED IN 1961 THAT THEY COULD HAVE DEVELOPED LOT 1, AND WHETHER THEY INTENDED TO DO SO, AND WHETHER THEIR EXPECTATIONS WERE REASONABLE UNDER ALL THE CIRCUMSTANCES.

IF THE PLAINTIFFS PROVE EACH OF THESE THREE ELEMENTS OF LIABILITY, THEN THEY HAVE ESTABLISHED A TAKING OF THEIR PROPERTY IN TERMS OF THE FIFTH AMENDMENT, AND YOU MUST THEN CONSIDER THE AMOUNT OF FAIR COMPENSATION TO BE AWARDED TO THEM FOR SUCH A TAKING. YOU WILL HEAR OPINION TESTIMONY PRESENTED BY BOTH SIDES DURING THE TRIAL REGARDING THE DETERMINATION OF THE VALUE OF THE PROPERTY FOR YOUR CONSIDERATION IN THE EVENT THAT YOU REACH THAT ISSUE. AND I WILL INSTRUCT YOU FURTHER ON THE DETERMINING OF FAIR COMPENSATION AT THE CLOSE OF THE CASE, AND OF COURSE, AS I SAID, I WILL INSTRUCT YOU FURTHER ON EACH PRONG OF LIABILITY AT THE CLOSE OF THE CASE.

Appendix F

I'D LIKE TO SAY A FEW WORDS ABOUT YOUR CONDUCT AS JURORS. FIRST, I INSTRUCT YOU THAT DURING THE TRIAL YOU ARE NOT TO DISCUSS THE CASE WITH ANYONE, OR PERMIT ANYONE TO DISCUSS IT WITH YOU. UNTIL YOU RETIRE TO THE JURY ROOM AT THE END OF THE CASE TO DELIBERATE ON YOUR VERDICT, YOU ARE SIMPLY NOT TO TALK ABOUT THIS CASE. AND SECOND, DO NOT READ . . .

APPENDIX G — TRANSCRIPT OF TRIAL BEFORE THE HONORABLE JEROME B. SIMANDLE DATED MARCH 15, 1995 (CHARGE TO JURY) [PAGES 73-74]

[73] AND DUNE ORDINANCE AND ITS FLOOD PLAN ZONING ORDINANCE HAVE CAUSED A TAKING OF THEIR PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

THE DEFENDANT CITY OF OCEAN CITY DENIES THAT ANY TAKING HAS OCCURRED, OR THAT ANY COMPENSATION IS DUE UNDER THE CIRCUMSTANCES OF THIS CASE. THIS PORTION OF THE FIFTH AMENDMENT PROVIDES THAT, QUOTE, "PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION," CLOSE QUOTE. A GOVERNMENTAL REGULATION CAN AMOUNT TO A TAKING EVEN IF THE GOVERNMENT DOES NOT PHYSICALLY APPROPRIATE THE PROPERTY, IF THE REGULATION IS FOR THE PURPOSE OF A PUBLIC USE, AND IF THE REGULATION DEPRIVES THE PROPERTY OWNER OF THE OWNER'S REASONABLE INVESTMENT BACKED EXPECTATIONS OF AN APPROPRIATE USE AS I SHALL EXPLAIN IN GREATER DETAIL IN A MOMENT.

IN ORDER TO PREVAIL IN THIS CASE, THE PLAINTIFFS HAVE THE BURDEN OF PROVING EACH OF THE FOLLOWING ELEMENTS OR INGREDIENTS BY A PREPONDERANCE OF THE EVIDENCE: NUMBER ONE, THAT THE OWNERS ACTUALLY HAD A REASONABLE INVESTMENT BACKED EXPECTATION IN 1961, WHEN THEY PURCHASED THESE LOTS THAT THEY INTENDED BUILDING ON LOT 1, WHICH HAS BEEN EXTINGUISHED

BY THE DEFENDANT'S REGULATIONS. IN OTHER WORDS, YOU MUST DETERMINE WHETHER THESE PLAINTIFFS ACTUALLY ASSUMED IN 1961 THAT THEY COULD HAVE DEVELOPED LOT 1, AND WHETHER THEY [74] INTENDED TO DO SO, AND WHETHER THEIR EXPECTATIONS WERE REASONABLE UNDER ALL THE CIRCUMSTANCES.

NUMBER TWO, THE SECOND ELEMENT, THAT THE TWO LOTS SHOULD BE CONSIDERED SEPARATE, RATHER THAN ONE PARCEL IN TERMS OF THE OWNER'S REASONABLE EXPECTATIONS WHEN THEY BOUGHT THEM.

NUMBER THREE, THE THIRD ELEMENT, THAT THE IMPACT OF THE REGULATIONS DENIES TO THE OWNERS ALL PRACTICAL USE OF THE PROPERTY IN LOT 1, THAT IS THAT IT SUBSTANTIALLY DESTROYS THE BENEFICIAL USE OF PRIVATE PROPERTY WHEN CONSIDERING LOT 1 AS A WHOLE. IF THE PLAINTIFFS PROVE EACH OF THESE THREE ELEMENTS OF LIABILITY, THEN THEY HAVE ESTABLISHED A TAKING OF THEIR PROPERTY, AND YOU MUST CONSIDER THE AMOUNT OF FAIR COMPENSATION TO BE AWARDED FOR SUCH A TAKING, AND I WILL INSTRUCT YOU FURTHER ON THIS DETERMINATION IN A FEW MOMENTS.

SO LET'S GO BACK FOR A MOMENT TO THE FIRST ELEMENT, WHICH IS CALLED REASONABLE INVESTMENT BACKED EXPECTATIONS. THE FIRST ELEMENT PLAINTIFFS MUST DEMONSTRATE IS THAT THEY HAD AN ACTUAL AND REASONABLE

Appendix G

EXPECTATION TO DEVELOP LOT 1 WHEN THEY PURCHASED IT IN APRIL, 1961. THE ISSUE IS WHETHER THE PLAINTIFFS HAD A REASONABLE INVESTMENT BACKED EXPECTATION OF DEVELOPING LOT 1. A LAND OWNER CANNOT BE COMPENSATED FOR A GOVERNMENTAL TAKING OF HIS PROPERTY UNLESS HE CAN SHOW THAT HE HAD A REASONABLE INVESTMENT BACKED EXPECTATION FOR THAT PROPERTY AT THE TIME HE PURCHASED IT.

APPENDIX H — TRANSCRIPT OF TRIAL BEFORE THE HONORABLE JEROME B. SIMANDLE REFLECTING JURY'S RETURN OF VERDICT DATED MARCH 15, 1995 [PAGES 87-88]

[87] JURY CHARGE

(LUNCHEON RECESS TAKEN.)

AFTERNOON SESSION.

THE CLERK: ALL RISE.

THE COURT: BE SEATED, PLEASE. GOOD AFTERNOON.

I'VE BEEN INFORMED THROUGH MY DEPUTY CLERK WHO IS INFORMED BY THE MARSHAL IN ATTENDANCE THAT THE JURY HAS A VERDICT. I PROPOSE THAT THE JURY BE RETURNED TO THE COURTROOM AT THIS TIME SO THAT THEY MAY RETURN THEIR VERDICT. PLEASE BRING THE JURY IN.

THE CLERK: ALL RISE.

(JURY ENTERING.)

THE COURT: BE SEATED, PLEASE.

OKAY, LADIES AND GENTLEMEN, I'VE BEEN INFORMED THAT YOU HAVE REACHED A VERDICT. PLEASE GIVE YOUR ATTENTION TO MY DEPUTY CLERK, MRS. VITO.

THE CLERK: LADIES AND GENTLEMEN OF THE

Appendix H

JURY, WHEN I CALL YOUR NAME WILL YOU PLEASE ANSWER PRESENT.

(ALL JURORS PRESENT.)

THE CLERK: WILL THE FOREPERSON PLEASE RISE?

DOES THE JURY HAVE A VERDICT?

THE FOREPERSON: YES, WE DO.

THE CLERK: IS YOUR VERDICT UNANIMOUS?

THE FOREPERSON: YES, IT IS.

THE CLERK: THANK YOU.

THE COURT: THANK YOU. THE RECORD SHOULD REFLECT [88] I'VE BEEN PRESENTED WITH AN ENVELOPE. AND THE VERDICT MAY BE PUBLISHED AT THIS TIME.

THE FOREPERSON: I SUPPOSE — THE COURT: MY DEPUTY CLERK WILL ASK YOU THE QUESTIONS.

THE FOREPERSON: OKAY.

THE CLERK: WHEN I READ THE FOLLOWING INTERROGATORIES FROM THE VERDICT FORM, WOULD YOU PLEASE PROVIDE YOUR RESPONSE. WE, THE UNANIMOUS JURY, FIND AS FOLLOWS: TO NUMBER ONE, DID THE PLAINTIFFS HAVE AN ACTUAL

Appendix H

AND RECOGNIZABLE EXPECTATION TO DEVELOP BLOCK 3000, LOT 1, WHEN THEY PURCHASED IT IN APRIL, 1961.

THE FOREPERSON: NO.

THE CLERK: THANK YOU.

THE COURT: OKAY. I'LL RECEIVE THE VERDICT, AND IT'LL BE FILED WITH THE RECORDS OF THE COURT.

THE VERDICT THEN WOULD BE IN FAVOR OF THE DEFENDANT, NO CAUSE FOR ACTION.

LADIES AND GENTLEMEN, YOUR SERVICE NOW IN THIS CASE HAS BEEN COMPLETED. ON BEHALF OF THE LITIGANTS WHO COME BEFORE THIS COURT, AND ON BEHALF OF THE JUDGES OF THE COURT, I THANK YOU FOR YOUR SERVICE IN THIS CASE, FOR YOUR ATTENTIVENESS AT ALL TIMES. AND SO I'D LIKE TO EXCUSE YOU AT THIS TIME.

I'LL ASK YOU TO WAIT A MOMENT IN YOUR JURY DELIBERATION ROOM, SO THAT I CAN THANK YOU AND ALSO SO THAT I CAN RECEIVE . . .

APPENDIX I — NOTICE OF APPEAL FILED MAY 8, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 94-1681 (JBS)

ALEXANDER STORER, JR. and DOROTHY J. STORER,

Plaintiffs,

v.

CITY OF OCEAN CITY, a Municipal Corporation, in the County of Cape May, State of New Jersey,

Defendants

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the plaintiffs, Alexander Storer, Jr. and Dorothy J. Storer hereby appeal to the United States Court of Appeals for the Third Circuit from the Final Judgment entered as a result of a jury verdict in favor of the defendant rendered on March 15, 1995 and the Order Denying a New Trial entered by The Honorable Jerome B. Simandle, United States District Judge, on April 19, 1995, a copy of which is attached hereto.

Appendix I

Respectfully submitted,

s/ Mary J. Maudsley
Mary J. Maudsley, Esquire 1108
APRIL, MAUDSLEY & GOLOFF, P.A.
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P.O. Box 669
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(609) 390-9078

Attorney for Plaintiff

Dated: May 4, 1995

APPENDIX J — ORDER DENYING MOTION FOR NEW TRIAL ATTACHED TO NOTICE OF APPEAL DATED APRIL 19, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 94-1681 (JBS)

ALEXANDER STORER, JR., and DOROTHY J. STORER,

Plaintiffs,

v.

CITY OF OCEAN CITY, a Municipal Corporation, in the County of Cape May, State of New Jersey,

Defendant.

ORDER

This matter having come before the court upon the motion of plaintiffs for a new trial pursuant to Fed.R.Civ.P. 59(a); and the court having considered the submissions of the parties; for the reasons stated in the Opinion of today's date;

IT IS this 19th day of April, 1995 hereby

ORDERED that plaintiff's motion for a new trial is DENIED.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

(2)

No. 95-1811

Supreme Court, U.S.
FILED
JUN 3 1996

In The

Supreme Court of the United States

October Term, 1995

ALEXANDER STORER, JR.; DOROTHY J. STORER, his wife,

Petitioners,

vs.

CITY OF OCEAN CITY, A Municipal Corporation in the County of Cape May, State of New Jersey,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court exercise its discretion in granting a Writ of Certiorari when the Opinion of the Third Circuit is not in conflict with any decision of another United States Court of Appeals ruling and the legal issue asserted by Petitioners has been fully addressed by the United States Supreme Court?

2. Was the Third Circuit correct in applying the "parcel as a whole" rule of law set out in the leading case of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)?

3. Was the Th d Circuit correct in its factual finding that the subject property was clearly part of a "whole parcel" consisting of a beachfront duplex of substantial value and vacant land, requiring affirmation of the jury verdict?

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STATEMENT OF JURISDICTION

Petitioners bring this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1), requesting review of the Opinion of the Third Circuit entered as a judgment on February 6,1996.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the Fifth and Fourteenth Amendments to the United States Constitution as set out by Petitioner.

STATEMENT OF THE CASE

The following facts were stipulated at the trial of this matter. In April of 1961 Petitioners Dorothy and Alexander Storer purchased two lots in Ocean City, Cape May Count, New Jersey, now known as Lot 1, Block 3000 which was vacant land and Lot 9, Block 3001, which was improved with a duplex. The total purchase price was $50,000. Petitioners also own Lots 44 and 51, Block 61121 which are vacated street beds of Wesley Avenue adjacent to Lots 1 and 9.

A portion of Petitioners' property — Lot 1 and the vacated street ends — lies within the "Beach and Dune Zone" of Ordinance 88-27 ("Zoning and Land Development Ordinance") which was adopted in June of 1988. This Ordinance allows only passive recreational use and all building and development is prohibited. The stated purposes of the Ordinance are (a) to regulate the use of beach and dunes as a flood preventative land form in order to secure safety from flood and other natural disasters; (b) to provide sufficient space for recreational uses in order to meet the needs of all New Jersey citizens, and (c) to promote the conservation of a valuable natural resource. (*See* Appendix C to Petition, pages 16a-17a).

Supplementing these stipulations, the following facts were adduced at trial. Petitioners came to Ocean City in February of 1961 from their home in Collingswood New Jersey, looking to purchase a duplex where they could rent one apartment and keep the other for a family vacation home (Transcript 3/13/94 page 40-17). Petitioners were acquainted with a local realtor, Robert Monihan (since deceased), who had previously rented apartments to them (Transcript 3/13/94 page 41-4).

Petitioners initially chose Lot 9 Block 3001 which was improved with a duplex, and agreed to pay $40,000 (Transcript 3/13/94 page 41-18). At that time Mr. Monihan showed Petitioners the lot directly east of the duplex, which was "ocean front" (Transcript 3/13/94 page 34-23). Lot 1 consisted of sand dunes and a bulkhead, admittedly to provide protection from ocean flooding (Transcript 3/13/94 page 110). The realtor told Petitioners that Wesley Avenue, which was an unimproved paper street between Lots 9 and 1, would be improved "in the near future", giving street access to build on Lot 1 (Transcript 3/13/94 page 43-23 to 44-3).

Petitioners thus purchased Lot 1 for $10,000 (Transcript 3/13/94 page 45-6). The conveyance was made by one deed, for a total purchase price of $50,000 (Transcript 3/13/94 page 86-13; Deed entered into evidence as P1). For about eight years subsequent, Petitioners rented out both the top and bottom duplex apartments (Transcript 3/13/94 page 73-5) and then began using the second floor apartment as a family vacation home. The rental income on the bottom floor apartment has been approximately **$13,000 per year** (Transcript 3/13/94 page 75-22).

Between 1961 and 1989 (twenty eight years) Petitioners did not consult one city official, architect, engineer, attorney, or other professional regarding (1) the "promised" vacation of

Wesley Avenue; (2) development of Lot 1 in any way (Transcript 3/13/94 page 70; Transcript 3/14/94 page 36-12); or (3) whether Petitioners could cut through the bulkhead on Lot 1 to build a duplex (Transcript 3/14/94 page 44-19). Petitioners retired in 1984, moving permanently to Florida (Transcript 3/14/94 page 37-14). Through an Ocean City Ordinance passed in 1971, the street end at 30th Street (where the duplex is located) was vacated, vesting title in plaintiffs of approximately another 6400 square feet (Transcript 3/14/94 page 48-23). Petitioners claim that when they became aware of this vacation in 1989 they determined to sue the City for "taking" of Lot 1 (Transcript 3/14/94 page 49 to 51). Dr. Storer admitted that had the City not vacated 30th Street, which action he believed provided access to Lot 1, the underlying lawsuit would never have been filed (Transcript 3/14/94 page 53-10).

Dr. Storer testified that they were looking for "ocean front" property and thought that the duplex shown them on Lot 9 was "beach front" (Transcript 3/13/94 page 29-4). The duplex on Lot 9 satisfied Petitioners' criteria for a beach front property (Transcript 3/13/94 page 35-4). Dr. Storer was looking for the "propensities" available from an "ocean front" lot, such as direct access to the beach, the ocean, the view, etc. (Transcript 3/13/94 page 29 to 30). Dr. Storer admitted that even though they have never been able to build on Lot 1, the "beach front" duplex on Lot 9 provides these same amenities (Transcript 3/13/94 page 30-20). Dr. Storer testified that Lot 9 with the improved duplex, was valued at $794,000 (3/14/94 page 31-25).

On cross examination, Dr. Storer admitted that he could still see the ocean from his duplex on Lot 9, enjoy the sun and the breeze, unobstructed by any building, thus preserving the value of Lot 9 as an oceanfront property. (Transcript 3/14/94 page 59:21 to page 61:23). Although he could "physically" see the ocean from Lot 9, Dr. Storer explained that emotionally "all I can

do is look across a lot that's been taken from us that is a very valuable property, and that's all I can see when I look out across there" (Transcript 3/14/94 page 60:18). Dr Storer stated that he cannot go to the beach "without thinking of what we're losing from the actions that the City has taken" (Transcript 3/14/94 page 61:17).

Based on this evidence, the jury returned a verdict of no cause for action, having found initially that Petitioners had not shown any "reasonable investment backed expectations" in the original purchase of Lot 1. Petitioners then moved for a new trial based on "the rapid decision of the jury, in light of the overwhelming evidence" (Petitioners' Brief in Support of Motion for New Trial). When this post verdict motion was denied and judgment entered, Petitioners appealed to the Third Circuit, arguing in part that the jury instructions were erroneous, although it was undisputed that the Court held a lengthy jury charge conference, and Petitioners' counsel never objected to the Charge or Jury Verdict Form.

The Third Circuit affirmed the verdict, finding that although the District Court's jury instructions were "flawed" (Appendix A page 2a), they were not sufficiently prejudicial under these factual circumstances to give rise to plain error (**"The plain error doctrine is not so permissive as to permit us to reverse and remand this case on the present facts"; Appendix A page 41**). The Third Circuit Court engaged in a detailed factual analysis and found that **"(t)he dispositive issue here should have been whether the 'relevant parcel' consisted of Lot 1 alone or Lots 1 and 9 together"** (Appendix A page 6a-7a). Applying the rule of law set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Third Circuit found that the "whole parcel" analysis precluded reversal of the jury verdict:

> **The Court's decision in *Penn Central* provides strong authority for defendant Ocean City on the dispositive relevant parcel issue. In light of this, we cannot say with any confidence that the Storers would have prevailed on their inverse condemnation claim if the jury had been instructed properly. There is an excellent chance that plaintiffs still would have lost. Although it is possible that the Storers could have prevailed if the jury had been instructed properly (or if trial counsel had objected to the erroneous instructions and had them corrected), such highly speculative tort recoveries do not fall within the purview of the plain error rule.**

(Appendix A page 12a).

Thus the Third Circuit's analysis of the case was completely focused on its independent factual findings based on the evidence before the jury. Petitioner relies almost exclusively on a reference to a footnote/dictum in the case of *Lucas v. So. Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Respondent respectfully submits that there is no basis for granting a Writ of Certiorari in this case.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS FAIL TO PROVIDE ANY COMPELLING REASONS REQUIRING THIS COURT'S REVIEW OF THE THIRD CIRCUIT'S FACTUAL AND LEGAL ANALYSIS OF THE JURY VERDICT.

A Writ of Certiorari to the Supreme Court of the United States is not a matter of right, but one of judicial discretion, which will be granted "only for compelling reasons". *Rules of the Supreme Court of the United States*, Rule 10. The Court will rarely exercise its discretion in this regard when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Id.* Rather, the Court considers "compelling reasons" to include (1) the entry of a decision which is in conflict with another Court of Appeals decision on the same important matter; (2) a Court of Appeals decision on a federal question which conflicts with a decision by the State Court of last resort; or (3) a decision which so far departs from the accepted and usual course of judicial proceedings as to call for the extraordinary exercise of the Supreme Court's jurisdiction. Rule 10.

A review of the Petition before this Court shows an abject lack of factual or legal foundation for the exercise of this Court's discretion. Petitioners, unhappy with the jury verdict and Appellate Court factual findings, have attempted to frame a novel legal issue where none exists. The facts of this case do not approximate those in *Lucas, supra.* except to the extent that beachfront property is involved. If, as suggested by Justice Scalia's dictum in a footnote in *Lucas*, the Supreme Court has not yet decided how to delineate the "property interest" to be valued in an inverse condemnation case, this is clearly not the case to address that issue.

Petitioners rely exclusively on Justice Scalia's footnote in *Lucas* as support for the assertion that this Court has never provided guidance on the "delineation of property interest against which the loss of value is to be measured in an inverse condemnation case". This is a misstatement of the legal issue before the Third Circuit. As recognized by the Appellate Court in this case, *Penn Central, supra* does indeed provide the relevant standard for delineating the property interest; the Third Circuit notes only that "*Penn Central's* expansive conception of the relevant parcel was criticized in *dictum* in the Court's decision in *Lucas*" (Appendix A page 9a). Therefore, it is not that this case presents a novel issue of first impression. Rather, Petitioners do not agree with valid on-point precedent from the Supreme Court, and the Third Circuit's application of that precedent to the particular facts of this case.

Although *Lucas* provides a general analysis of takings jurisprudence, it neither departs drastically from traditional takings law nor applies particularly to the facts of this case. In this case, Petitioners purchased two contiguous lots in 1961, one with an "up and down" duplex residence, the other an unimproved beach lot. The duplex was purchased with the intention of providing direct visual and physical access to the ocean from the fronting beachfront lot. Indeed, it is this precious location that affords the duplex its substantial rental income (from one of the two units) as well as its inherent appraised value of nearly $800,000. Nevertheless, when Petitioners became aware of certain municipal regulations prohibiting building on the beach, they attempted to segregate out as a discreet parcel the contiguous beachfront lot which inherently benefitted the upland duplex residence.

Comparing these specific facts to those in *Lucas*, this case is so clearly distinguishable as to make other Supreme Court takings cases much more relevant and applicable. In the late

1970's David Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston in South Carolina. Toward the close of the development cycle for one residential subdivision Lucas, in 1986, purchased two residential lots for $975,000, intending to build single family homes. The undisputed facts showed that Lucas' intention with respect to the lots "was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences". *Ibid.*

In 1988 the South Carolina Legislature enacted the Beachfront Management Act which barred Lucas from erecting any permanent habitable structures on the two parcels. It is within this factual framework that the United States Supreme Court ultimately found a compensable taking of property. Comparing the facts of *Lucas* to those before the Court, it is clear that *Lucas* offers little in terms of on-point precedent. David Lucas had developed property in the area for eighteen years before the State zoned two particular lots into inutility. When Lucas purchased the two lots for $975,000, then, he clearly had a legitimate and reasonable expectation that he would be able to continue his pattern of development. Owners of parcels ***immediately adjacent*** to his had built single family residences. There was no confusion as to what Lucas intended to do, or why he paid nearly a million dollars for the subject parcels.

The Storers, on the other hand, negotiated the purchase of a duplex residence in 1961. They did not even know of the existence of a lot to the east. Their realtor urged them to purchase the lot **in order to preserve the value of the residence**. If they did not purchase the subject lot, someone else might, and then **they would no longer have beachfront property**. The Storers were not developers. They had no expectation or interest in building on the lot. In fact, in 1961 they had no access to the lot and therefore knew it was not buildable. Their realtor told them

that Wesley Avenue would someday be improved, thereby giving them access to the lot. They never investigated the claim further. There were no homes on adjacent lots to the north or south of the sand dune which comprises the subject property. To this date, Wesley Avenue has not been improved, and the duplex on Lot 9 is worth nearly $800,000.

David Lucas paid $975,000 for two lots which were not related in any way to any other parcels and which were zoned into inutility. The Storers, as part of a "package", purchased an entire parcel for $50,000 as reflected in the single deed of conveyance. The beach lot was informally allocated $10,000 of the total purchase price. The critical distinctions between *Lucas* and the present matter are obvious: David Lucas had reasonable investment backed expectations for the property, and the subject regulations denied him **all beneficial use** of the land; the Storers, to the contrary, had **no** expectations for the property — in fact, they did not even know the subject lot existed when they sought to purchase the residence. If an expectation grew with negotiations, it was that the beachfront lot would enhance the value of the duplex, and if Wesley Avenue was ever improved there was a possibility of construction.

David Lucas was a developer and had, in fact, been developing the area of sixteen years prior to purchasing his lots. The Storers wanted a home and ended up buying the subject lot to preserve their beachfront view and access. The downstairs duplex unit grosses $13,000 per year in rent and the entire property where the duplex is located is assessed at $792,000. Clearly, the Storers still have quite valuable "beachfront property" in part ironically, because no building can occur on the beachfront in Ocean City. Therefore, if indeed Justice Scalia's footnote/dictum in *Lucas* merits resolution of a larger question, this is not the case the Court should choose to do so.

Petitioner attempts to assert that "numerous" Courts of Appeals have "struggled" with the issue of delineation of property rights for purposes of determining whether a compensable takings has occurred. Of the four cases cited, one has already been denied certiorari to this Court, one is factual inapposite, and two set forth principles fully consistent with the Court of Appeals in this case. Clearly, there is no "struggle" in this area of the law. Further, as more fully set forth below, this Court has amply defined the measure of the "whole parcel" approach to value in inverse condemnation cases.

Petitioner first cites *Naegele Outdoor Advertising Inc. v. City of Durham,* 844 F.2d 172 (4th Cir. 1988). Respondent would respectfully point out that Petitioner did not set forth the complete citation of this case, which shows clearly that the Petition for Writ of Certiorari in *Naegele* was denied at 115 S. Ct. 317, 130 L. Ed. 2d 278 (1994). Further, *Naegele* involved a billboard ordinance in reference to a major outdoor advertising company and presented issues of prematurity and factual incompleteness in the record. Thus, *Naegele* is of no support to Petitioners in an effort to have certiorari granted in this case. However, the appellate court in *Naegele* cited and relied upon *Penn Central, supra.* for the "whole parcel" approach to determination of property affected:

> **"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole — here the city tax block designated as the "landmark site".**

Naegele, supra, 844 F.2d 172 at 176 *citing Penn Central, supra,* 438 U.S. 104, 130-31.

Thus the appellate court in *Naegele* did not "struggle" with any issue regarding delineation of property rights, but appropriately relied on the *Penn Central* standard, which remains good and appropriate precedent, as did the Third Circuit in this case.

Petitioner's reliance on *Furey v. The City of Sacramento,* 780 F.2d 1448 (9th Cir. 1986) is similarly misplaced. That case involved a very fact specific inquiry as to whether the government-compelled sewer assessment could constitute a takings. If anything, both *Furey* and *Naegele,* while factually inapplicable, support the generally accepted principal that each takings case must be determined through an "ad hoc, factual inquiry". *Naegele, supra,* 844 F.2d at 174.

Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) (Petitioner's brief, page 13) may be factually inapplicable, but is also supportive of Respondent's position that there is no "compelling need" to grant certiorari in this case. *Clajon* involved a challenge to Wyoming's hunting regulations as violative of Equal Protection and the Commerce Clause by plaintiffs who were ranchers offering hunting services to out-of-state residences. Plaintiffs argued that the complete evisceration of a "single stick in the bundle of property rights", that is, the right to hunt on one's property, could constitute a taking. *Id.,* 70 F.2d at 1577. Again citing and relying on *Penn Central, supra.,* the Court of Appeals held that **"the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land"**. *Ibid.* This outright rejection of the "single stick" approach asserted in other cases has been summarily rejected in favor of the traditional *Penn Central* analysis involving the "whole bundle" of property rights. *See e.g.,*

Marshall v. Rhodes, 912 F. Supp. 1456 (U.S.D.C. Wyoming 1996); *Concrete Pipe & Prods v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).

Finally, *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) provides no support for Petitioner's application. In that case, the Court of Appeals reversed the District Court's finding of summary judgment, and remanded for further factual inquiry on the single versus whole parcel issue. This case again cites and relies upon *Penn Central* in guiding the lower court's future inquiry, and reiterates that each case must be determined by an ad hoc factual inquiry on a complete record.

The factual inquiry on the complete record in this case shows without dispute that the Petitioners purchased a "whole bundle" of property rights when they took title to Lots 9 and 1 in 1961, in one deed of conveyance and a singular transfer. The "whole parcel" approach is well established in takings jurisprudence. Petitioners have attempted to create a legal quagmire where none exists. There is no "compelling reason" for granting certiorari in this case.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE "PARCEL AS A WHOLE" RULE SET OUT IN *PENN CENTRAL* AND THERE IS NO REASON TO EXERCISE THIS COURT'S DISCRETION TO REVIEW THE CORRECT APPLICATION OF THIS LAW.

As observed by the United States Supreme Court in *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F. 2d 707 (3d Cir. 1985), *aff'd*, 480 U.S. 470, 107 S. Ct. 1232 (1987) and *Andrus v. Allard*, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979), takings jurisprudence has always focused on the nature

and extent of interference with rights in the whole parcel, not discrete segments. In *Andrus, supra.* the Court noted that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."

The test for a regulatory taking requires the Court to compare the value that has been taken from the property with the value that remains in the property. *Keystone, supra,* 480 U.S. at 497. One of the critical questions, then, is determining how to define the unit of property "whose value is to furnish the denominator of the fraction". *Id.* In *Penn Central, supra,* the Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights ***in the parcel as a whole,*** 438 U.S. at 130-131, 57 L. Ed. 2d 631, 98 S. Ct. 2646

(Emphasis Supplied).

This "whole parcel" as opposed to "discreet segments" approach has been endorsed and followed by the New Jersey Supreme Court. *See Bernardsville Quarry Inc. v. Borough of Bernardsville,* 129 N.J. 221, 608 A.2d 1377 (1992); *Gardner v. New Jersey Pinelands Comm'n,* 125 N.J. 193, 593 A.2d 251 (1991). This fact is important to the issue as framed by Petitioner, as Justice Scalia invites review of a State's Supreme Court

decision on "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Lucas*, 112 S. Ct. at 2893 n. 7, 120 L. Ed. 2d at 813, 814 n.7.

The "whole parcel" theory of a property denominator is not conceptually difficult and in fact is quite consonant with takings jurisprudence which has consistently examined a claimant's "bundle of rights" as opposed to a "single stick". Petitioners cannot reasonably argue with the well established principal that they cannot segregate their property into discreet parcels, and be compensated for an alleged taking of a "single stick" in the bundle. This was the argument proffered by plaintiffs in *Clajon* and summarily rejected. Thus, the Third Circuit correctly analyzed the legal issue in terms of well established takings jurisprudence. There is no reason to disturb the application of the law in the court below.

III.

THE THIRD CIRCUIT CORRECTLY APPLIED THE FACTS OF THIS CASE TO THE APPROPRIATE LAW AND ITS FACTUAL ANALYSIS SHOULD NOT BE DISTURBED.

The Petition before this Court does not address the specific facts of this case but attempts to frame a legal argument in order to overturn an adverse jury verdict. The law requires, however, a specific "ad hoc factual inquiry" into each takings case in order to determine if the owner has been deprived of "all economically beneficially use". The first part of this analysis requires a determination of the parcel allegedly affected by municipal regulation. In this case, the jury was asked first to determine whether the Storers had "reasonable investment-backed

expectations" for the subject property. The jury found no such expectations and the Third Circuit appropriately concluded that this finding could well be based on and supported by the facts of this case.

Implicit in the jury's finding of no "reasonable investment-backed expectations" is the conclusion that Lots 9 and 1 were a contiguous "whole parcel". As pointed out by the court's opinion, "a finding that Lots 1 and 9 were discrete properties would have inevitably led to a finding that a taking had occurred" because it was undisputed that there could be no development of Lot 1. Therefore, although this jury was not asked at the outset to define the "whole parcel" affected, it clearly understood that Petitioners had one "bundle" of property rights — Lot 9, consisting of a very valuable duplex residence, and Lot 1, which protected and enhanced the value of that property. Dr. Storer testified that he would never have sought compensation if he had not found, some eighteen years after purchase, that there could be no development on Lot 1. Petitioners purchased Lots 9 and 1 concurrently in one deed, by one conveyance, and clearly derived benefit from the beachfront parcel (Lot 1) which gave Petitioners' access to the beach and an unobstructed view of the ocean, a property asset which the jury clearly considered both valuable and inextricably related to the whole of Petitioners' property.

So compelling was the factual record in this case that the Third Circuit concluded that the jury would have found, in any event, that Lots 9 and 1 were one parcel. The initial jury finding is in fact completely consistent with this conclusion. Thus there was no reason for the Third Circuit to overturn the jury's finding that no compensable taking had occurred. Had the jury considered Lot 1 a discrete and separate parcel, it would have been forced to consider the denial of "all economically beneficial use" to that particular parcel. The overwhelming

evidence at trial, however, showed what this jury concluded as the truth: Petitioners purchased two contiguous lots in one transfer, with Lot 1 wholly related to the use, enjoyment, and value of Lot 9. A tax line delineation, segregating lots and parcels for the municipality's purposes, is *not* the test for conceptualizing a "whole parcel". Rather, *Penn Central* instructs courts to conceptualize beyond artificial lines and boundaries to focus **"on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole"**. *Penn Central,* 438 U.S. 130-31, 98 S. Ct. at 2662.

Respondent respectfully submits that the legal "issue" raised by this Petition is illusory. With a mandate to engage in an extensive "ad hoc factual inquiry" and with guidance from *Penn Central,* courts can and do make factual determinations as to what constitutes the "bundle" of property rights as opposed to a single "stick". If Justice Scalia's concern in *Lucas* needs amplification at some point in time, this is clearly not the case where the Court would undertake such an analysis. Both the jury, implicitly, and the Third Circuit explicitly found that the Storers purchased two lots as one "whole parcel" which brought with it a "bundle of rights". A property owner cannot assert a right to compensation for an individual part of a whole parcel.

The factual underpinnings of the jury verdict as well as the Third Circuit's conclusions are valid and should not be disturbed. There is no "compelling reason" for granting certiorari in this case.

CONCLUSION

Petitioners have not met their burden of showing compelling reasons for this Court to exercise its discretion. The decision of the Third Circuit was consistent with other Appellate Court decisions, as well as numerous Supreme Court cases. The application of the appropriate law to the specific facts of this case clearly support both the jury verdict and the Appellate Court's affirmance. For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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